Supreme Court, U.S.
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No. 95-1262

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC.,

Petitioners,

v.

CINERGI PICTURES ENTERTAINMENT INC., ANDREW G. VAJNA and RANDOLPH M. PAUL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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46 pp

PARTIES BELOW

Respondents respectfully disagree with Petitioners' characterization of the parties to this action in two respects. First, Petitioners assert that Cinergi Productions, Inc., a California corporation, is a party. In fact, there is no such entity. Second, Petitioners fail to include as a party with an interest in the outcome of this litigation Cinergi Productions Inc. (California), which was recently added by Petitioners as a defendant in the trial court proceeding.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Cinergi Pictures Entertainment Inc., Andrew G. Vajna and Randolph M. Paul (collectively "Respondents") hereby respond to the Petition for Writ of Certiorari (the "Petition") filed by Petitioners Laurence Fishburne and The LOA Productions, Inc. (collectively "Petitioners"). Respondents respectfully request that this Court deny the Petition.

Review by this Court is unnecessary and inappropriate because (1) the issue raised by the Petition is now moot, (2) the issue before this Court in *Jaffee v. Redmond*, 51 F.3d 1346, 1356 (7th Cir. 1995), *cert. granted*, 116 S.Ct. 334 (Oct. 16, 1995) (No. 95-266), is irrelevant to this action, and (3) there is no issue in this case as to the constitutional right of privacy.

I. The Sole Issue Raised By The Petition Is Moot.

The Petition challenges the trial court's order[1] compelling Petitioners to deliver Petitioner Fishburne's entire diary to the discovery referee for *in camera* inspection when, according to Petitioners, at most only one entry is relevant to the lawsuit.[2] However, Petitioners have recently

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1 Both the California Court of Appeal and the California Supreme Court declined to disturb the ruling of the trial court.

2 Petitioners' assertion that there is only one relevant passage in the diary is unsupported by the record. In addition to refusing to produce the diary, Petitioners in fact have also consistently refused

(continued...)

represented that they will produce substantially more than the one diary entry they claim to be relevant, if not all of the diary, to the discovery referee for *in camera* inspection. Indeed, they have already so produced a copy of a portion of the diary.

Petitioners, on February 13, 1996, confirmed to the trial court at a recent hearing that "we have provided the one entry that your Honor's order was about." (App. 7.) Petitioners' counsel went on to state at the same hearing:

> "But in order to protect our trial date, at great cost and at great deliberation, we have elected to comply with the order, produce to [discovery referee, Retired] Judge Wolf -- we already produced the one entry and now produce to Judge Wolf the entirety of the diary during the period of the parties' negotiations for him to confirm that the one entry we've already given is the only entry. And we have -- I have the diary in my office. I'm prepared to give it to Judge Wolf immediately. That would be complete compliance..." App. 9.

Petitioners also represented at the hearing that "we're willing to produce the diary in toto to Judge Wolf." (App. 21.)

Following the above hearing, Petitioners further represented that they will produce the diary "in toto" to the discovery referee for *in camera* inspection. In a letter dated February 16, 1996, Petitioner's Counsel of Record wrote the discovery referee in pertinent part as follows:

"As you know we previously provided to Your

2(...continued)
even to state whether other diary entries responsive to Respondents' discovery, such as, for example, on the issue of mitigation of damages, even exist. *See, e.g.*, App. 15-17, 19.

Honor ... the diary entry dated May 10, 1995...
"We are prepared to provide Your Honor with Mr. Fishburne's psychotherapy diary, for your in camera review, at your earliest convenience....We respectfully request that you please contact the undersigned, as soon as you are able to schedule an in camera review, consistent with Judge Haber's order." App. 32.

The above letter constitutes a further representation by Petitioners that they will comply with the trial court order that is the subject of the Petition by delivering the entire diary to the discovery referee for *in camera* inspection, and they have already provided to the discovery referee for *in camera* inspection a copy of a portion of the diary. Petitioners have therefore committed to producing for inspection substantially more than the single diary entry they assert is relevant, leaving as the only possible remaining issue how much more of the diary must be inspected by the discovery referee to comply fully with the trial court's order. The Petition is therefore moot because much more than the one supposedly relevant entry is going to be produced for inspection in any event.

As this Court has noted, "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy...and a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975), quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Mootness has been found where a subpoena directed to a third party was challenged, but the third party returned documents to the

subpoenaing party prior to resolution of the challenge. *Harris v. Board of Governors of Federal Reserve System*, 938 F.2d 720 (7th Cir. 1991). *See also North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (habeas corpus proceeding moot where respondent had already been discharged from prison).

No determination of this Court regarding the trial court's order that is the subject of the Petition will affect rights of the litigants in this proceeding because Petitioners have represented they will imminently permit an *in camera* inspection of much more of the diary than the one entry they claim is relevant, if not the entire diary. The fact that the *in camera* inspection has not yet occurred is irrelevant to the mootness of the Petition as Petitioners have represented that they shall so produce the diary. It is thus "the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision [on mootness]." *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (representation of respondents that student who challenged school admissions policies as discriminatory would be permitted to remain in school regardless of outcome of case adopted by Court in finding student's claim to be moot).

II. The Issue Before This Court In *Jaffee v. Redmond* Has Nothing To Do With Any Issue In This Case.

Petitioners assert that because there is a split among the circuits as to the existence and scope of a federal psychotherapist-patient privilege which this Court agreed to address in *Jaffee v. Redmond*, 51 F.3d 1346, 1356 (7th Cir. 1995), *cert. granted*, 116 S.Ct. 334 (Oct. 16, 1995) (No. 95-

266), the instant Petition presents an issue which this Court has already found to be of great import. In point of fact, *Jaffee* is entirely irrelevant to the instant case because there is no such split as to the existence or meaning of California's statutory psychotherapist-patient privilege (California Evidence Code § 1010, *et. seq.*), which is applicable to this California case. The split among the circuits is therefore on an issue -- the existence and scope of a federal privilege -- that has no bearing on this case.

The issue before this Court in *Jaffee* is, "Should this court resolve conflict between federal courts of appeal about existence of psychotherapist privilege under Rule 501" and, assuming such a privilege is recognized, to which mental health care providers should it extend? *Jaffee v. Redmond, supra,* 64 U.S.L.W. 3281 (U.S. Oct. 17, 1995) (No. 95-266). The instant case, by contrast, is a state (California) case governed by California law, which has a statutory scheme (California Evidence Code § 1010, *et. seq.*) establishing a psychotherapist-patient privilege. Whether there is a federal psychotherapist-patient privilege under Rule 501 and, if so, its scope -- the issue in *Jaffee* -- therefore has no relevance to this case.

Here, the state trial court made the factual determination that the subject diary entries were not protected from discovery by California's statutory psychotherapist-patient privilege because they did not constitute a "communication" between patient and psychotherapist as required by California Evidence Code § 1012. Petitioners' counsel concedes, and the trial court has confirmed, that the trial court then weighed and balanced the parties' respective interests, finding that Petitioners' constitutional privacy interest in the diary was outweighed by

Respondents' need for discovery of portions of the same. (App. 15, 16, 18.) In short, there is no commonality whatsoever between the issue in *Jaffee* and any issue in the instant case.

III. There Is No Issue In This Case As To The Constitutional Right Of Privacy.

Petitioners suggest this case somehow presents an issue as to the existence or scope of the constitutional right of privacy. That is incorrect. Petitioners, who argue that a constitutional right of privacy exists and is applicable to Petitioner Fishburne's diary, concede that the trial court determined that Petitioner Fishburne's constitutional privacy interest in the diary was outweighed by Respondents' need for discovery of certain entries in the same. (App. 15, 16.) The trial court has also confirmed that this was the analysis it employed. (App. 18). It is therefore clear the trial court found a constitutional right of privacy to exist; without such a finding it could not have balanced Petitioner Fishburne's right of privacy against Respondents' discovery interests. Petitioners are therefore not in a position to challenge the trial court's finding of a constitutional right of privacy; Petitioners themselves urge this Court to reach the same conclusion.

Even assuming the trial court determined there is no constitutional right of privacy -- the exact opposite of what it actually concluded -- there is no split among the circuits on the issue. No federal circuit court of which Respondents are aware has held that there is no constitutional right of privacy. This case therefore presents no constitutional conflict or issue requiring resolution by this Court.

IV. Conclusion.

For the foregoing reasons, the Petition should be denied forthwith.

Respectfully submitted,
Norman S. Oberstein
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Howard L. Horwitz
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Attorneys for Respondents

APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT WE B JUDGE ALAN B. HABER

LAURENCE FISHBURNE, et al.,) No. SC 031 787
)
Plaintiffs,)
)
vs.)
)
CINERGI PRODUCTIONS, INC.,)
et al.,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
February 13, 1996

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O R I G I N A L

LOS ANGELES, CALIFORNIA; TUESDAY, FEBRUARY 13, 1996

DEPARTMENT WE B JUDGE ALAN B. HABER

APPEARANCES:
Counsel for the Plaintiffs, ANDREW WHITE, Esq., MELVIN N. A. AVANZADO, Esq.;

Counsel for the Defendants, HOWARD L. HORWITZ, Esq.

THE COURT: 45, Fishburne versus Cinergi Productions, et al.

MR. HORWITZ: Good afternoon, your Honor, Howard Horwitz for Defendants.

MR. WHITE: Good afternoon, your Honor, Andrew White and Melvin Avanzado of Christensen, White, Miller, Fink, Jacobs, Glaser and Shapiro on behalf of Plaintiffs.

MR. AVANZADO: We're in the wrong place, your Honor.

MR. HORWITZ: Well I think we're all moving parties here.

THE COURT: You're both moving parties. It's okay--

MR. WHITE: We're both in the wrong place.

THE COURT: I can handle it. You know somehow I feel like I've done something and I'm being punished with this case.

MR. HORWITZ: The case that won't go away.

THE COURT: Someone is trying to make me sorry that I ever ruled the way that I did. Look, I understand it's important to you and I hope you don't interpret that as demeaning your positions, okay, I'm not. It's just that -it's like this is a case that just doesn't -- I'm not talking about your effort. I'm not begrudging your effort for appellate relief. You may remember, or may not remember, I refused to be very strident about enforcing the order knowing that it was a close -- I felt it was a close issue and knowing that you were up seeking appellate remedies. I really don't know what's happened. Did you abandon your petition to the Supreme Court, U.S. Supreme Court?

MR. WHITE: We have not, your Honor. We have petitioned -- and I think we received confirmation today that was placed on the docket last week. Your Honor, the confirmation we got dated the 9th of February is that the case was filed December 12, '95 and placed on the docket on February 8 of '96. It has case number 95-1262.

MR. HORWITZ: Your Honor, what happened is the last time we were here a little over two months ago, counsel came into court and indicated that they were that day filing and serving the petition for writ of cert to the U.S. Supreme Court.

THE COURT: Didn't have the right format.

MR. HORWITZ: Well, when we got back to our offices it was -- the papers were bounced as not complying with the technical requirements and they waited approximately 60 days to resubmit it.

MR. AVANZADO: We didn't waive, your Honor. I mean, it's a difficult thing.

THE COURT: Look, they're the Plaintiff in this lawsuit. If they're not in a hurry to get to trial -- I mean, they may be in a hurry to get to trial, but if they're seeking appellate relief that makes it not feasible to get to trial, that's on them it's not on you.

MR. HORWITZ: Your Honor, that is an issue before you because we in fact have a March 18 trial date, and it's our position that they deliberately waited because this Court indicated it would not sanction them until the appellate remedies were exhausted. So if they could get the matter to trial before that happened then they wouldn't have to deal with the sanctions issue.

THE COURT: Okay, now I understand --

MR. AVANZADO: Your Honor, let me -- if I --

THE COURT: Look, I will hear from you but let me just respond to that before I overlook it. Obviously there's an issue of fairness. You're the moving party on the discovery material.

MR. HORWITZ: Correct.

THE COURT: And you shouldn't -- your client should not be in the position of having to go to trial if you have an entitlement to the material. For example, the Supreme Court declines to get involved -- or gets involved and doesn't see it the Plaintiff's way, my order ought to be complied with. And if it can't be complied with because of their efforts at appellate relief prior to March 18th, what I ought to do right now, given that that's just a little over a month away, is probably continue the trial.

MR. HORWITZ: Your Honor, we made such a motion. The Discovery Referee Judge Wolf has recommended that the Court vacate the trial date.

THE COURT: Yes, I just received his report, his recommendations, but it's rather lengthy. I didn't have a chance to review it. I just saw it for the first time this morning.

MR. HORWITZ: Yes, your Honor.

THE COURT: Is that what he recommended?

MR. HORWITZ: In a nutshell he's recommended that while all of this is going on the trial date be vacated because there are so many unresolved --

THE COURT: We don't vacate trial dates, but if you're talking about a continuance.

MR. HORWITZ: Then a continuance.

MR. AVANZADO: Your Honor, let me address this. The underlying -- the mistake in inference I think the Court is drawing from all of this is that we have not complied with

your order.

THE COURT: Well that is the impression I had. Now keep it in mind --

MR. AVANZADO: We have --

THE COURT: Wait, let me just finish because I think I really need to correct the impression you have. The last time I had anything to do with this, prior to reading this new motions that are before me as I recall, is learning --and I can't recall the form that it took -- that there was some defect procedurally in your application to the Supreme Court.

MR. AVANZADO: Correct.

THE COURT: Not until just now did I learn that you've renewed your effort and you're on the Supreme Court docket. So when I wrote this tentative ruling my assumption was that I hadn't seen anything, or heard anything that you had, for whatever reasons, abandoned, knowing your trial date was March 18th, you just hadn't pursued any further relief before the U.S. Supreme Court. You've correct that impression now, okay.

MR. AVANZADO: Correct. The problem in the formatting is that the Supreme Court requires you to retype everything and we had a problem with the printer on that. That's what took so long.

MR. HOFWITZ: Your Honor, I spoke with the printer yesterday and they represented to me it takes -- they can do it overnight.

MR. AVANZADO: That having been said, you have to submit the appendix as part of your brief and it has to be re-entered into a brief format, and they want us to spend $30,000 on a brief --

MR. HORWITZ: You can scan it, your Honor, and have it done in less than two days.

MR. AVANZADO: Regardless of the issue, all right -- regardless of that issue, what I was addressing in terms of what I believed is a misconception by the Court, is that we have provided the one entry that your Honor's order was about.

THE COURT: But if you haven't --

MR. AVANZADO: We have.

THE COURT: Oh, you have?

MR. AVANZADO: We have provided --

THE COURT: To who?

MR. AVANZADO: To Wolf and he redacted it and he gave it to the Defendants. Now --

THE COURT: Then I misunderstand.

MR. AVANZADO: Now, the only other issue, and I think we addressed it at --

THE COURT: I'll hear from you. Only one at a time though, please.

MR. HORWITZ: Thank you, your Honor.

MR. AVANZADO: The only other issue that really is a problem for us -- we obviously disagreed with your initial order.

THE COURT: No question, I understand.

MR. AVANZADO: We're trying to limit what Judge Wolf looks at and your initial order, which you have confirmed in your tentative, was that what is to be produced is notice of when Fishburne got the part. That was your prior order. Now on page five of the transcript of our first hearing on this, and that's, you know, way back when, I asked you the question, "What portions of the diary am I suppose to give to Judge Wolf?" and your statement to me was, "Let Wolf decide." But Judge Wolf doesn't believe he is capable of making that determination. He thinks that's for you to decide. That's why we're coming forward. And if the issue is what the notice was of Fishburne getting the part, okay, and that has already been provided. The one entry has already been provided to them. The only remaining issue, is what does Judge Wolf look at to insure that we're not being less than forthcoming.

THE COURT: Are you talking about the scope of the journal or the diary?

MR. AVANZADO: Correct.

MR. WHITE: Correct.

THE COURT: The time frame?

MR. AVANZADO: The time frame. - And that's why we

made the motion--

THE COURT: I thought I delineated the time frame at some point.

MR. AVANZADO: You did not, your Honor.

MR. WHITE: We thought it was clear, your Honor. If I could just clarify our position.

THE COURT: Look, I promise you I'll hear from you.

MR. WHITE: Okay, okay. Mr. Horwitz has not quite stated it accurately. We have pursued our remedies before the Supreme Court. But in order to protect our trial date, at great cost and at great deliberation, we have elected to comply with the order, produce to Judge Wolf -- we already produced the one entry and now produce to Judge Wolf the entirety of the diary during the period of the parties' negotiations for him to confirm that the one entry we've already given is the only entry. And we have -- I have the diary in my office. I'm prepared to give it to Judge Wolf immediately. That would be complete compliance and I can assure you because I've reviewed every single word in there myself. There isn't another word in there that falls under the portions of your Honor's order --

THE COURT: I don't know why there's some disagreement. I thought I set forth a time frame.

MR. HORWITZ: No, your Honor.

MR. WHITE: The time frame is clear from the action. It starts in April and goes to June.

THE COURT: Well but there's a dispute over what the appropriate time frame is --

MR. AVANZADO: In terms of what is actually to be produced for the in camera inspection, I don't believe that your Honor's order stated a time frame as to which entries are to be produced. Now, what is to ultimately be produced after redaction by the referee to the Defendants, your Honor was perfectly clear that it was during the notice to Fishburne of when he got the role. But that -- obviously if you take the relevant period, that could only be when the parties were engaged in their discussions.

MR. WHITE: The language in the minute order of September 14, '95, your Honor, is discovery referee to redact everything except "notice of Fishburne to get movie role production, to be within the 20th." But the phrasing -- everything except, "Notice of Fishburne to get movie role," everything else is cut out. That notice occurred in April and it's been produced.

MR. AVANZADO: April or May I think.

MR. WHITE: May, I believe it's May. That's been produced.

THE COURT: And the referee, Judge Wolf, reviewed the entire journal or diary?

MR. HORWITZ: No, your Honor. The diary has never been delivered to him.

MR. AVANZADO: That is the part we're arguing over, what portion of the diary is to be the inspection. We gave him--

THE COURT: You're saying you took out an entry in the diary--

MR. WHITE: We gave them two pages.

MR. HORWITZ: They photocopied it.

COURT: Okay, now I understand.

MR. AVANZADO: We gave them the photocopy of the entry where the notice appeared.

THE COURT: And redacted everything else.

MR. AVANZADO: No, we gave it to them in full, the full entry. And he ordered us to redact.

THE COURT: And that's in April.

MR. AVANZADO: That's April or May.

MR. HORWITZ: It's a May 9 or May 10 entry, your Honor.

THE COURT: All right, your position?

MR. HORWITZ: Your Honor, this is an attempt by Plaintiffs to use this Court's prior order to avoid having to produce what we believe are smoking-gun documents. We're not going to the U.S. Supreme here about the entry that's been produced. It's because, your honor, there are other relevant key entries in that diary and they don't want Judge Wolf either to see it or for this Court to indicate that relevant entries have to be produced.

THE COURT: Well that's an assumption that you make. But, why -

MR. HORWITZ: I agree, your Honor.

THE COURT: Why can't there be a legitimate -- I mean, that's certainly one scenario.

MR. HORWITZ: Yes.

THE COURT: I'm not prepared to accept that any more or less than I would the other scenario that they believe that I have violated Mr. Fishburne's constitutional rights of privacy and want to -- and I don't mean this facetiously and want to teach me a lesson, or want to vindicate their client's rights.

MR. WHITE: More the latter, your Honor.

MR. AVANZADO: More the latter.

THE COURT: No, I'm not -- really, I'm not demeaning you.

MR. HORWITZ: Your Honor, I would have agreed that that was a possibility until Plaintiffs offered to make a portion of the diary available to the discovery referee for examination, but not the portion that would have the key entries. And, your Honor, there must be a presumption here that there are smoking-gun documents because Plaintiffs have refused to identify which entries in the diary fall within our discovery and they've -

THE COURT: I'm not permitted to -- I won't permit myself to draw that conclusion.

MR. HORWITZ: I agree, your Honor. That is why we proposed and Judge Wolf directed us to seek clarification. When he looks at that order he -

THE COURT: Well I can only tell you that I certainly wouldn't have ordered -- I mean, it may seem circular to you -- I certainly wouldn't have required a discovery referee to make the inspection unless I felt it were appropriate to do it. I realize that's self serving. But if I wanted you to decide what is appropriate to be produced, I wouldn't have delegated the responsibility to a referee.

MR. HORWITZ: Your Honor, may I just explain my argument?

THE COURT: Yes.

MR. HORWITZ: Your Honor, Judge Wolf simply wanted to know, and asked us to bring a motion before this Court to confirm, that when he opens up that diary and sees relevant entries that he is to produce them. And Plaintiffs are arguing that this Court has somehow determined that he should not do that. That he should somehow -

THE COURT: Well isn't it possible -- the statement that was made to me earlier this afternoon was, just a few minutes ago, was that Judge Wolf doesn't think that he should do the reviewing he thinks I should do it.

MR. HORWITZ: No.

MR. AVANZADO: I said, your Honor, that he was not -- in the first transcript you said Judge Wolf was to determine which entries of the diary were to be produced to him for inspection based on your order on what was he ultimately

looking for. And Judge wolf didn't believe that he was empowered to determine that, that you had to make the determination whether we had to give him all the diary or only the period of time in which the relevant entries could be--

THE COURT: Right.

MR. HORWITZ: That's not -- I disagree vehemently, your Honor. Judge Wolf has made more than clear he is prepared to follow this Court's order, read the diary, identify the relevant entries and the only request for clarification on his part is what to do when he finds a relevant entry because Plaintiffs contend that this Court has ruled that he should not produce it, which of course is not the case because it has not been before this Court.

MR. WHITE: Your Honor, the Court's order, as you indicated in your tentative, is clear. The referee is to redact everything out except notice of Fishburne to get the movie role.

THE COURT: Right.

MR. WHITE: That's in the minute order of September 14th, very clear. And if that is the Court's order, clearly we can deal with that easily with the referee.

MR. HORWITZ: Your Honor, this Court should not -

MR. WHITE: Mr. Horwitz wants to -

MR. HORWITZ: Let me finish, Counsel.

MR. WHITE: -- expand that. That's the whole issue.

THE COURT: I understand that. I think I understand it, but now I'm concerned.

MR. HORWITZ: Your Honor, there's a problem here. The problem is that Plaintiffs have refused to comply with the code that requires them to identify entries that are responsive to discovery and they've refused to permit the discovery referee to look at the diary to identify which entries may be discoverable and be within our discovery. Any order from this Court that allows them to hide those entries without having to describe them or allow the referee to look at it, just causes gross injustice.

MR. WHITE: Your Honor, the concern that Mr. Horwitz is bumping into is precisely the concern that prompted this order in the first place. This is not a personal diary. It is not even an attorney/client communication. It is a psychotherapy communication. And we presented arguments to the Court that because of that nothing in this diary should be revealed to anybody, not to us, not to the referee and certainly not to them.

MR. HORWITZ: Your Honor, this is --

MR. WHITE: Your Honor balanced that and came up with the order of September 14 that said based on Mr. Fishburne's acknowledgment that there was an entry in there that reflected his receiving notice -- he already disclosed that in his deposition before we knew the diary existed. Your Honor ordered production with respect to that limited area. Your Honor did not say that this entire diary is open for discovery. This is a psychotherapy/patient communication. That is the reason we're here. That is the whole basis for our motion, and your Honor did a balancing. You clarified on September 14 that you did a balancing for the need for

discovery versus Mr. Fishburne's right of privacy with respect to those communications and concluded that with respect to this area discovery was appropriate. We're prepared to permit complete discovery and produce the diary for complete discovery. However, Mr. Horwitz now wants you to rule that this entire diary is devoid of any protection and anything in there that might remotely relate to this lawsuit is subject to production, and that's not the Court's prior order.

MR. AVANZADO: And as to the code, your Honor, we identified the diary itself on a privilege log asserting the psychotherapist/patient privilege. There is no requirement in the code that I take the one book and take every entry and make separate entries for each separate entry in the book. And that's the problem that he's running into. We complied with the code. We did not see the diary, quite frankly, until after all of this transpired and we are prepared to go forward in order to keep our trial date.

MR. HORWITZ: Your Honor, the law is clear that where a party seeks to invoke the psychotherapist/patient privilege it is their burden to produce facts sufficient to invoke the privilege. There has been no evidence submitted to this Court that any of these other entries that may be there either were created as part of a psychotherapist/patient relationship, or as required in People versus cabrol (phonetic), their dominant purpose was to facilitate therapy. Under Plaintiff's argument -

MR. WHITE: That's a false statement, your Honor.

MR. HORWITZ: Let me finish, Counsel. Under Plaintiff's argument, if a therapist tells someone to maintain a diary you can then keep a record of a criminal enterprise and

because your therapist told you to keep it that makes it privilege. That is not the case. If you seek to withhold an entry you must show that the dominant purpose of that entry is to obtain therapy. Your Honor, the problem here is we're arguing in a vacuum. If they were required to identify the entries within our discovery, or the discovery referee was allowed to look at the diary and identify what's relevant, we could then examine this issue of whether the psychotherapist/patient privilege prevents its discovery. But they haven't told us what's there so we can't address it. We don't know the name of the therapist. We don't know when the entries were created. We don't know what the purpose of the entries was. We have no idea what any of it's about. How can we respond to their self serving argument that they're somehow privileged. We're in the dark. It would be a travesty if they were permitted to hide these documents, never identifying them, never explaining how they might be privileged. Judge Wolf is prepared to look at them, and, fine, maybe they don't have to be turned over if this Court doesn't want to permit that, but at least then we can know what we're talking about.

MR. WHITE: Your Honor, the argument that Mr. Horwitz just made is, and he knows it, flatly incorrect. He examined Mr. Fishburne. Mr. Fishburne explained that he maintains this diary because he is frequently geographically on location away from his therapist and at his therapists request he writes down -- in lieu of having an oral session with his therapist, he writes down his thoughts, feelings, et cetera in the journal and provides the journal in toto to his therapist as part of his therapy. For Mr. Horwitz to get up here and argue that it's not a psychotherapist and there's no record establishing that is just playing with the facts unfairly.

THE COURT: I come back to where I started from in a

sense, I don't see any reason why I need to change my order.

MR. HORWITZ: Well, your Honor, what if the referee looks at another relevant entry? This Court hasn't determined that that shouldn't be produced or identified. That is why Judge wolf directed me to bring this motion. He wants to know what to do when he finds other relevant entries in their diary.

THE COURT: Well, when you use the term "relevant entries" you mean on the issue of notice?

MR. HORWITZ: Mitigation of damages for example.

THE COURT: No, no, that really -

MR. HORWITZ: We sought that at the outset of this case.

THE COURT: Yes, but I must tell you, and to be perfectly candid with you, the only reason that -- for better or for worse, the only reason that I ordered the production of the diary to the referee was because I was convinced -- you convinced me that there was a relevance that outweighed the privacy interest on the issue of notice.

MR. HORWITZ: And, your Honor, I can make -- I could convince this Court I am confident on other documents if we knew what they were. How can I even make the argument without knowing what they are?

MR. AVANZADO: It has to be with respect to issues of the case. And I think all the issues of the case -- You don't need to know what's contained in the diary to talk about what issues of the case he thinks could overcome the right of

privacy. And notice was clearly what your Honor had in mind and in the notice -- in terms of notice, the only possible notice had to come between April and June of '94.

MR. HORWITZ: Your Honor, Mr. Fishburne's own testimony is, he didn't even find out that he hadn't gotten the part in this picture until July. So when they say cut it off in June 16, obviously if he made an entry, "Spoke to my agent today. He told me I didn't have the deal. That's no surprise because I knew there was no contract." That entry would be within the period that they're trying to withhold from us. And your Honor I'll give a very brief explanation as to why there may be other entries in here. A critical issue in this case, is that after Mr. Fishburne lost this part he was offered another role in the motion picture Water World, our contention is he had an obligation to mitigate his damages. There's an issue about why he turned down that part that we believe may be dispositive of the case as a whole. If there's an entry in there relating to why he turned down that other part, that would be extremely probative. They've not even been required to identify whether it's there or not. Let them say now to this Court that there is no entry in that diary related to Water World. I would like to hear that. They haven't said it to date.

MR. WHITE: Your Honor, to talk about what's in the diary would violate the privilege we're trying to protect.

MR. HORWITZ: Not subject matter.

MR. WHITE: That's the whole purpose. To talk about the contents of that diary -- Mr. Horwitz obviously -

MR. HORWITZ: That speaks volumes, your Honor, as to what's in there.

MR. WHITE: Excuse me, sir. Mr. Horwitz obviously fundamentally disagrees with the right of privacy in psychotherapy. We have presented extensive argument both to this Court and to the Appellate Courts that the very invasion -- and I can confirm to the Court that the order of this Court has already severely undermined the privacy and the sanctity of the man's psychotherapy. It has already had that effect. Mr. Horwitz doesn't care about that or doesn't believe it, but it's a fact. And for me to get up and tell you what's in the diary or what's not in the diary would just violate every principle we're trying to protect here. The Court made an order -- the Court made an order on September 14 limiting the production to entries regarding notice to Fishburne to get the movie. We're prepared to comply with that in toto immediately in order to protect our-
THE COURT: By doing what?

MR. WHITE: By producing the diary to Judge Wolf and letting him look for -- there's only one. He can find anything else he wants to on that issue. But for Mr. Horwitz now to claim that the entire diary is open for full scale discovery and it has no protection at all, it is inappropriate, it's inconsistent with the Court's prior order and that would be a far cry from what the Court did do.

MR. AVANZADO: Your Honor, just to clarify one more thing -- just to clarify one more thing.

MR. WHITE: Your Honor -

MR. HORWITZ: Two against one.

THE COURT: Listen, you should take comfort, I only let one of them speak at a time, so what's the difference?

MR. HORWITZ: Well they have a third attorney here and he can come up and speak as well.

MR. AVANZADO: Your Honor, our only concern, we're willing to produce the diary in toto to Judge Wolf. Your Honor, we can from your statement to me at the first hearing on this, that Judge Wolf would have the power to skip over the dates and not read completely the dates where obviously the parties were not in discussion. I think this diary was created in '93, I believe, and so there's entries in '93 that has absolutely nothing to do with this case; then I think, your Honor, that we would be comfortable with that. Judge Wolf is able to -- obviously he's a learned man who can separate the wheat from the chaff.

MR. HORWITZ: Your Honor, Judge Wolf is only interested in reading the part between April and August of 1994. I can't envision that anyone wants to see anything either before or after. That seems to be the relevant date.
It's interesting that Counsel represents to the Court there's no entry in there relating to the movie other than this one entry. But when we ask him a point blank question, is there an entry in that diary related to Water World or why Mr. Fishburne turned down that part, suddenly the privilege prevents him from responding to the Court. Your Honor, they've never identified -- this Court has to I think assume that there is such an entry in there.

THE COURT: Well, that's really tortured reasoning.

MR. HORWITZ: Then let them identify the entries so we can then know what we're talking about. But they can't have it both ways. They can't refuse to tell us what's there. Refuse to let the referee look at it and say I'm overreaching because I want to look at everything. I don't want to look at

everything. I don't want to see his innermost thoughts. I just want to see what's relevant to this case. We all have confidence Judge Wolf can separate the wheat from the chaff, but why deny him the opportunity -- if he finds something in there from his knowledge of the case is highly probative, why should that be withheld.

MR. WHITE: Your Honor -

THE COURT: Yes.

MR. WHITE: -- I'm the only person other than Mr. Fishburne and his therapist who has seen that diary, and I can confirm to the Court that all it is his innermost thoughts. To authorize any further invasion beyond the relevant time period that we've outlined, is a cruel invasion into this man's psyche. It's already been invaded by the Court, the Court has already entered, and Mr. Horwitz obviously doesn't care about that. But I can tell you from having read the diary myself, in person, it is painfully personal material.

MR. HORWITZ: His thoughts about Water World may very well be highly probative.

THE COURT: All right, let me just -- I really thought I would get this out of my system at least by the time I left the bench. Let me just reflect on this and go back and look at the papers. I don't need a great deal of time. By tomorrow morning I'll come up with a result.

MR. HORWITZ: Your Honor, with respect to our request about the trial date, would the Court -

THE COURT: Well, I heard Plaintiffs' counsel indicate

that they would like to retain the trial date.

MR. WHITE: That's the whole reason that we have agreed to produce what we have agreed to produce, your Honor, is to protect the trial date.

THE COURT: This is not your Court of last resort for a continuance. I would do it if there was an agreement. I really have no business adjusting trial dates over the objection of one party or more than one party.

MR. HORWITZ: It is the recommendation of the referee.

THE COURT: I understand.

MR. WHITE: Based on non-production and non-compliance. Once we have confirmed we've already complied --

THE COURT: Well my concern is, one -- and I don't know to what extent I'm prepared to change the order if I am prepared to change the order that I initially made. But assume for the sake of discussion that I don't, I don't know when you'd be prepared to turn over to Judge Wolf -- I don't know his availability. I don't know how soon he'd be prepared to reveal whatever he feels ought to be revealed.

MR. WHITE: Thursday afternoon, your Honor.

MR. AVANZADO: And we see him tomorrow morning.

MR. HORWITZ: If they don't comply with the order by turning over the diary, then we have to bring our motion for sanctions in front of Judge Wolf, he then issues a

report and recommendation, it comes back to the Court. His conclusion was, however it comes out there's no way this can get resolved before the trial date.

MR. WHITE: That is not true. That is absolutely not true.

THE COURT: Well, gentlemen, I have not read his recommendation.

MR. HORWITZ: That's what it says.

THE COURT: I find it unlikely that Mr. Horwitz would misrepresent the recommendation of Judge Wolf. It would be rather easy for me to pull it and -

MR. AVANZADO: Quite frankly, your Honor, the recommendation is based on his view that we would continue to pursue our appellate rights.

THE COURT: And not turn over the diary.

MR. AVANZADO: And not turn over -- that's correct.

MR. WHITE: Our offer to produce the diary comes after that report and recommendation, specifically to protect our trial date.

THE COURT: All right. Well, I -- Look, you're certainly free to move for a continuance if they're -

MR. HORWITZ: We have, your Honor, in front of this Court. There is a motion pending before this Court.

THE COURT: Well, before Judge Perez.

MR. HORWITZ: No, before this Court, your Honor. We have -- before this Court this day a motion to vacate the trial date.

THE COURT: Then I must have overlooked it. I thought I just had the two motions.

MR. AVANZADO: I think, your Honor, it was requested as relief.

THE COURT: All right, then -

MR. HORWITZ: It is in the caption of the motion. It is in the notice of the motion.

THE COURT: Let's assume that it's timely made. Isn't it a little bit premature for me to be granting the continuance based on what I've been told here and what you've been told?

MR. HORWITZ: Your Honor, if this Court were willing at this late date to reconsider its order and deem what they've done as full compliance, then perhaps we could stick with the trial date. But anything other than that -- and I'm confident this Court will not do that -- anything other than that will make it absolutely clear we're not going to have closure and resolution within the next four weeks in time to prepare for trial.

THE COURT: Well what if you have a resolution within the next seven days?

MR. HORWITZ: How, your Honor?

MR. WHITE: If your Honor sticks with the priority,

you'll have a resolution in 48 hours.

MR. HORWITZ: No.

THE COURT: Let's assume that I stick with the prior order -

MR. HORWITZ: Which requires him to turn over the entire diary

THE COURT: Yes.

MR. HORWITZ: -- which they've indicated they won't do.

MR. AVANZADO: We would do if your Honor confirms that Judge Wolf has the authority -

THE COURT: I've already ruled.

MR. AVANZADO: I understand that.

THE COURT: I don't need to make the same order twice.

MR. AVANZADO: But Judge Wold doesn't seem -- was uncomfortable because of arguments made by counsel.

THE COURT: You can explain it to him.

MR. AVANZADO: We will.

MR. WHITE: We can.

THE COURT: You know it's interesting, I've run into him on two or three occasions socially in the last month

and believe it or not we've not discussed this at any -- I mean it's interesting, I have to communicate through you, which is okay. It's just as well that it happened that way.

MR. WHITE: If the prior order is confirmed and there's no change, the order will be confirmed and complied with within 48 hours, probably -

MR. HORWITZ: There's still going to be a dispute about what this Court's order is. I can tell you that from the history of this case. They're going to take the position they need not turn over the entire diary even the portion through August. They are going to take that position.

THE COURT: At this point, based on the representations that I've heard, I don't think that it would be appropriate for me to continue the trial considering that it's the 13th of February. The trial is what, 34 days away, 33 days away.

MR. WHITE: Correct.

THE COURT: I'd be hard pressed to find at this point there was good cause. Now, based on the representation as to when the diary journal would be turned over to Judge Wolf and when Judge Wolf would most probably decide this issue, your motion might not -- if things don't pan out the way the Plaintiff claims they expect them to, then it might be appropriate.

MR. HORWITZ: But, your Honor, they are going to contend that this Court has now ruled that they need not turn over the entire diary.

THE COURT: I' m not sure what I'm going to do. What I'm saying is, your motion is not -- it's just a little bit

premature, not a lot premature.

MR. HORWITZ: This Court indicated two months ago when we were here and -

THE COURT: What else can I tell you?

MR. HORWITZ: I guess my concern is, I can't believe that this Court would not permit us some opportunity to address the discoverability of other entries whether now or by some other motion or --

THE COURT: That's what I'm going to contemplate. I want to -- as much as I hate to I'm going to revisit this this evening.

MR. HORWITZ: I apologize that we've burdened the Court with this extra work.

THE COURT: No, you' re doing your job. That's what I'm supposed to be doing. Sometimes it gets a little bit too much, that's all.

MR. HORWITZ: If the Court is inclined to enforce its prior order requiring the entire diary to be turned over or contemplate at least some mechanism by which we could litigate the issue of whether some other relevant entries might be discoverable. I would ask -

THE COURT: Well you've made your -- look, it's either going to be thumbs up or thumbs down after I review the pleadings again -- the briefs again.

MR. HORWITZ: If it's a partial thumb up, or whatever it might, if the Court would at least reconsider -- or not

reconsider -- consider the motion on--

THE COURT: Well you've asked me to do that.

MR. HORWITZ: -- the motion on the trial date, that's all. I would think the Court should consider that as part of its determination.

THE COURT: I think you're probably about a week premature from a Court being in a position to say the case should be continued, the trial should be continued or it shouldn't.

MR. WHITE: Your Honor, if the Court were, God forbid, the entire diary be published in the Santa Monica Register and we did it tomorrow, we could keep our trial date. That's within our power.

THE COURT: All right, I'll get notice out tomorrow.

MR. WHITE: Thank you, your Honor.

THE COURT: You're welcome.

MR. HORWITZ: Thank you, your Honor. (Proceedings in the above-entitled matter were concluded.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B HON. ALAN B. HABER, JUDGE

LAURENCE FISHBURNE et al.,No. SC 031 787

Plaintiffs,

vs .

CINERGI PRODUCTIONS, INC., et al.,
Defendants.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES ss

I, HORACE W. BRIGGS, a duly designated transcriber, do hereby declare and certify under penalty of perjury that I have caused to be transcribed the portion of tapes 1 and 2 which were duly recorded in the Superior Court of the State of California, County of Los Angeles, Department WE B, on the 13th day of February, 1996, in the above-mentioned case, and that the foregoing 27 pages comprise a true and correct, accurate transcription of the aforementioned tape.

Dated this 16th day of February, 1996.

_____
Transcriber

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DIRECT DIAL NUMBER

February 16, 1996

Via Fax and US Mail

The Honorable Leonard s. Wolf
Judge of the Superior Court (Ret.)
413 Howland Canal
Venice, California 90291

Re: Fishburne v. Cinergi

Dear Judge Wolf:

Enclosed herewith is a copy of Judge Haber's recent order dated February 14, 1996, denying all request for a modification or clarification of his prior order regarding your in camera review of Mr. Fishburne's psychotherapy diary. As Judge Haber ordered, "There is an insufficient showing for any modification or clarification, and no clarification is necessary."

By virtue of this order, Judge Haber has emphatically reaffirmed his prior minute order, dated September 14, 1995, which contains the following explicit limitation on the only portion(s) of Mr. Fishburne's psychotherapy diary that are not to be redacted:

> "Discovery referee to redact everything except notice of Fishburne to get movie role..."

As you know we previously provided to Your Honor (and Your Honor ordered production to defendants' counsel) the diary entry dated May 10, 1995, reflecting the notice to Mr. Fishburne on that date, when Mr. Fishburne wrote:

> "Good news on the work front. It looks like I'll Be playing opposite Bruce Willis in Die Hard III. I'm so grateful and happy to have been blessed with such good fortune. All I could think to do was get down on my knees and say a prayer."

We are prepared to provide Your Honor with Mr. Fishburne's psychotherapy diary, for your in camera review, at your earliest convenience. (Having personally reviewed the diary myself, I can assure you that your in camera review will confirm that the May 10 entry noted above is the only entry that is not to be redacted, pursuant to Judge Haber's reaffirmed order.) We respectfully request that you please contact the undersigned, as soon as you are able to schedule an in camera review, consistent with Judge Haber's order.

Very truly yours,

Andrew M. White
of CHRISTENSEN, WHITE,
MILLER, FINK, JACOBS,
GLASER & SHAPIRO, LLP

cc: Howard L. Horowitz, Esq.
(Via Fax and US Mail)

COUNTY OF LOS ANGELES
SUPERIOR COURT OF CALIFORNIA

Date: February 14, 1996	L. HERNANDEZ
HONORABLE	Deputy Clerk
ALAN B. HABER JUDGE	Electronic Recording
HONORABLE	Moniter
JUDGE PRO TEM	Reporter
J. Jimenez Deputy Sheriff	(Parties and Counsel
Court Attendant	check if present)
	NONE

SC031787	Counsel for
LAWRENCE FISHBURNE-ETC ET AL	Plaintiff
VS	NO APPEARANCES
CINERGI PRODUCTIONS, INC-ETC-ET AL	Counsel for Defendant

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

Plaintiff's motion for order modifying prior order re: production of psychotherapist diary and Plaintiff's motion to modify Court order requiring in camera inspection came on regularly for hearing on 2-13-96. The matter was argued and taken under submission. The Court now renders its decision as follows:

Denied. There is an insufficient showing for any modification or clarification, and no clarification is necessary.

A copy of this minute order is sent via U. S. Mail as follows:

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MINUTES ENTERED
Dept. WE B 02/14/96
COUNTY CLERK

MINUTE ORDER